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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-979

EUGENE KEALEY,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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In the

Supreme Court of the United States

October Term, 1973

No. .....

Eugene Kealey,

Petitioner,

—against—

The People of the State of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

Petitioner, Eugene Kealey, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of New York, entered on November 21, 1973, affirming the decision of the Appellate Division of the Supreme Court, Second Judicial Department, which in turn affirmed the judgment of conviction of Petitioner in the County Court, Nassau County on two counts of criminally negligent homicide.

Opinions Below

Petitioner was found guilty on February 12, 1971, after a trial by jury in County Court, Nassau County. The Trial Court did not file an opinion when the judgment of conviction was entered.

The judgment of conviction was affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Department. The Appellate Division's memoran-

dum opinion is reported at 336 N.Y.S.2d 440 (1972), and is set out in the Appendix, *infra*, p. 21. The Court of Appeals opinion is reported at 32 N.Y.2d ——, 348 N.Y.S.2d —— (1973) and is set out in the Appendix, *infra*, p. 17. The order of Sol Wachtler, Associate Judge of the Court of Appeals staying Execution of Judgment of Conviction is set out in the Appendix, *infra*, pp. 22, 23.

Jurisdiction

The judgment of conviction was entered by the Trial Court on May 3, 1971. The judgment of the Appellate Term was entered on March 6, 1972. The Court of Appeals affirmed the conviction without opinion on November 21, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Questions Presented

1. Whether Sec. 125.10 of the Penal Law of the State of New York read with its defining section 15.05(4) of the Penal Law, dealing with criminally negligent homicide is, as written, interpreted and applied, so vague and obscure as to violate the due process clause of the Fourteenth Amendment and Article 1, Section 9, Clause 3 of the Constitution of the United States.

2. Whether, under the Due Process clause, a person can be said to be guilty of the crime of criminal negligence because of his "failure to perceive" a risk that is "substantial and unjustifiable" where such risk and the failure to perceive it constitutes a "gross deviation" from the standard that a reasonable man would observe in a similar situation.

Statement of the Case

On September 14, 1968, at or about 6:00 p.m. (R. 266, 267, 525) Petitioner was driving his automobile in New York on a four lane highway, two lanes in each direction.

While attempting to pass the vehicle in front of him, a Chrysler operated by Richard Lucey, the right front of Petitioner's vehicle came in contact with the left rear of the Chrysler (R. 530, 877, 878). The Chrysler then accelerated, swerved off the road and struck a tree (R. 530, 541). This resulted in the death of Richard Lucey and Margaret Gribbin, a passenger in the Chrysler (R. 612, 614).

The vehicle driven by the Petitioner had been purchased two days prior to the accident (R. 866). He was driving it for the second time when the accident took place (R. 877). Petitioner admitted he was unfamiliar with the car's operation and feel, especially as to the power brakes with which his former car had not been equipped, and the new car's greater width (R. 902, 911, 914).

Petitioner was arrested and charged with two counts of manslaughter in the second degree and two counts of criminally negligent homicide and with driving while intoxicated. The two counts of criminally negligent homicide were dismissed along with the driving while intoxicated charge. The manslaughter counts remained. The trial judge included a charge of two counts of criminally negligent homicide of which Petitioner was convicted.

There is a sharp issue of fact in this case.

The first trial ended in a mistrial. On the second trial witnesses for the People testified there was an odor of

alcohol coming from Petitioner and that Petitioner appeared intoxicated. Doctor Rossano who was on the scene of the accident testified he detected no odor of alcohol on Petitioner's breath when he spoke to him (R. 594) and that the symptoms of intoxication and the symptoms of a concussion can be similar (R. 599). The testimony of a Doctor Grimes corroborated the testimony of Doctor Rossano (R. 837, 838). The testimony of a Doctor Bebry, who treated Petitioner for his injuries approximately six hours after the accident, was that the Petitioner had sustained a concussion (R. 929).

The defense offered testimony by several witnesses, all of whom were local businessmen, that within thirty to sixty minutes prior to the accident, Petitioner, had visited their place of business, appeared normal and gave no appearance of being intoxicated (R. 751, 763, 805, 807). Petitioner testified that shortly before leaving his home prior to the accident, he had had one can of beer (R. 850, 871, 886).

There are other controverted facts. A brief consideration of these facts is necessary to show that cases such as these are often complex.

Several of the People's witnesses testified that at a point in the highway approximately one-half mile from the scene of the accident on a sharp curve the Petitioner, while passing a motor vehicle, crossed the double yellow line, and went over into the southbound lane of traffic and then came back into the northbound passing lane of traffic (R. 310, 345, 347, 348, 349, 390, 391). After he came back into the northbound lane, the witnesses said, he proceeded to a point until these witnesses could no longer see him as he disappeared over a crest in the road (R. 283, 284, 350, 351). There is a conflict of testimony by said witnesses

as to whether he straddled the double yellow line after passing another car (R. 280, 281) at the curve aforementioned, or was wholly within the northbound lanes (R. 347, 348). Petitioner according to the testimony did not interfere with any southbound traffic at the time that he crossed the double yellow line (R. 367).

The Medical Examiner's Report of the autopsy performed on the driver of the other car, Richard Lucey, showed that the driver had .12 of alcohol in his brain and consequently was legally impaired at the time of the accident.

At the end of the trial, after the People's summation, the Judge charged the jury that there was no evidence that Petitioner had exceeded the legal speed limit, but that the jury might consider the factor of speed in making its decision (R. 1057, 1976). The Court, in its charge discussed the testimony concerning the Petitioner's crossing the double yellow line and then charged that the jury could take such fact into consideration, together with all of the facts, to determine whether or not Petitioner was reckless (R. 1064). The Court further charged that the jury might find Petitioner guilty of criminally negligent homicide as a lesser charge (R. 1016) within the manslaughter counts and in charging the jury specifically, read the statutory language of the section to the jury (R. 1061, 1062, 1063). During the course of the jury's deliberation, the jury requested a clarification of the charge (R. 1081) but the Court refused to do so and simply had the reporter read back its original charge (R. 1081).

On February 12, 1971, the jury returned a conviction on the two counts of criminally negligent homicide. All trial motions by Petitioner were denied and judgment of conviction was entered on May 31, 1971. Petitioner was sen-

tenced to a maximum of three years on each count, to run concurrently. An appeal was taken by Petitioner to the Appellate Term, Second Judicial Department. The Appellate Term, affirmed the conviction on March 6, 1972. Thereupon, Petitioner took an appeal to the Court of Appeals of New York. The Court of Appeals affirmed the conviction without opinion on November 21, 1973. On November 28, 1973, Associate Judge of the Court of Appeals, Sol Wachtler, ordered that the Execution Judgment of Conviction be stayed for a period of thirty (30) days to permit Petitioner to apply to this Court for a Writ of Certiorari.

The constitutional question was raised at both the Appellate Term and Court of Appeals of New York.

Statutes Involved

Penal Law of the State of New York, §125.10.

Criminally Negligent Homicide

"A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."

Penal Law of the State of New York, Section 15.05, subdivision 4.

Criminal Negligence

"A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such a result will occur or that such circumstance exists. The risk must be of such nature and degree that failure to perceive it

constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

Reasons for Granting the Writ

The constitutionality of the statutes involved, read together, have not been ruled upon by the courts of the State of New York. Other jurisdictions which have adopted this Model Penal Code provisions include Illinois (Ill. Ann. Stat. Ch. 38 §§4-6, 4-7), Wisconsin (Wis. Stat. Ann. §§940.06, 940.08), Michigan (Mich. Rev. Crim. Code §§305[c], 305 [d]). The provision is also before the legislatures of numerous other states. There are probably hundreds, if not thousands, of prosecutions each year under this statutory scheme or schemes similar thereto.

The subject statute, Penal Law §125.10, as defined by Section 15.05, Subdivision 4 of the New York Penal Law must fall because it is so vague as not to apprise an individual of precisely what conduct is or is not lawful. The statute acts to alter the role of the trier of fact from that of determining whether or not a particular fact existed to that of the legislature in determining whether a particular fact is or is not criminal.

What precisely would be "gross deviation" or the "applicable standard of care" or "what a reasonable man would have observed" are questions left to the tribunal. The trier of facts is left not to discover facts, which if existing determine a crime. Rather, the trier of facts first must invent some sort of unstated standard and then draw an unworkable and unknown line transforming civil negligence into criminal liability.

The Court of the State of New York in *People of the State of New York* v. *Firth,* 3 N.Y.2d 472, 168 N.Y.S.2d 949 (1957) struck down a similar and more definite statute than that at the bar. The statute, providing that no person should operate a motor vehicle at such speed greater than would permit him to bring a vehicle to a stop with injury to another or his property, was held by the Court to be too vague and indefinite to constitute a sufficient definition of criminal conduct, and contained no sufficient standard by which the driver's conduct could be tested. The Court held the statute did not give a clear and unequivocal warning to those who must obey the rule. Citing cases in *People* v. *Vetri,* 309 N.Y. 401, 405-406, 131 N.E.2d 568, 570-571, the *Firth* court felt that the statute was meaningless on its face. They permitted neither draftsman's comments nor a "saving" explanation by the District Attorney's office to sway the decision. "We may guess at what the draftsman intended . . . and there is material to show what was intended. But that is not sufficient." 3 N.Y. 2d at 474.

This Court will, as it has consistently done in the past, examine Penal Law §125.10 on its face and in its application. The law is vague and therefore unreasonable. In application it encourages precisely what this Court, should discourage, i.e. arbitrary conviction based on whether a particular lapse of perception is felt by the jury to be unreasonable. While such standards may apply in civil cases they will not do in criminal matters.

It has been held that Court will examine very closely those statutes creating a "new" crime. *U.S.* v. *Ragen,* 314 U.S. 513, 524 (1942). The penal statute does create such a "new" crime in doing away with recklessness, grossness

and culpability and substituting therefor "failure to perceive," "reasonable" and "justifiable."

If we examine the statute itself we note that to be held criminally negligent one must (a) "fail to perceive" a risk and (b) that such failure must be a "gross deviation" from a reasonable man standard of case. The risk itself must be "substantial" and "unjustifiable." Is this informative on its face as a criminal law must be? If so, what is a "justifiable risk"? And what constitutes a moderate or nominal as opposed to a "gross" deviation?

The drafters of the Model Penal Code (from which the statutes we are involved with are taken) as noted above, were at a loss to define culpable negligence at the criminal level. ". . . it is impossible to avoid tautological articulation of the final question" and "of the four kinds of culpability defined, there is, of course least to be said for treating negligence as a sufficient basis for imposing criminal liability." Tentative Draft No. 4, Model Penal Code, April 25, 1955, p. 126. The drafters go on in effect to avoid the question, leaving it to the tribunal.

Consider the case of the thoughtful or engrossed employee leaving his work. He enters his automobile to drive home. He should concentrate on driving but cannot.

Such conduct is typical of many of us.

On this day, the employee, while driving, has an accident resulting in someone's death. Is he guilty of criminally negligent homicide under Penal Law §125.10? If he barely misses a pedestrian is he guilty of attempted criminally negligent homicide? Or is he only civilly liable?

The statutory language raises other questions. Is the handicapped driver required to go slowly, more slowly,

much more slowly, than the average driver? Is a person with less ability to perceive and evaluate required to meet a lesser standard?

In New York as in nearly all other states the handicapped can be licensed to drive. "Consequently, one must assume from the language of the statute that if a driver legally proceeds into an intersection and comes into contact with an ambulance or fire vehicle with sirens on but which he did not hear, and a death results, such conduct would not be criminally chargeable against such a driver, although it would be as to another whose hearing was intact" (*People* v. *Buffington*, 304 N.Y.S.2d 746, 61 Misc.2d 429 at 756). Yet, are we not to charge the deaf driver with "failing to perceive" a risk if he does not adjust to his deafness? And what other arbitrary whimsical lines are to be drawn? Certainly it cannot be said that one will know his conduct will fall on the wrong side of such an arbitrary line from the reading of Penal Law §125.10.

The ultimate difference between the previously accepted standard that of "conscious disregard," or, as in other states, "reckless" or "wanton" and the new standard, deliberately chosen, of "failure to perceive" dooms the subject statute. The former standard, an affirmative act, tied in with previous legal history surrounding deliberate, active culpability gave meaning to the previous statute. The new standard creating a negative standard (the failure to perceive) is without meaning. It creates the impossible task of imposing criminal liability on non-criminal acts; of attempting to determine whether a particular individual could have "perceived" or appreciated the difficulties created by his conduct.

The older standards (still in use in most jurisdictions) give, at minimum, guidelines to the jury. When the conduct is a "failure to perceive" the jury really has no standard at all.

The question of the physical ability to perceive suggests other problems. The question is whether a person who is capable of being conscious of the circumstances can at the same time be conscious of creating a risk. The latter consciousness is a prerequisite of the failure to perceive. It may very well be that an individual may be conscious of certain elements but not capable of the conclusion. "Thus an intoxicated person may be conscious of the circumstances without it necessarily following that he can add them up and reach the conclusion that great danger must result." Roy Moreland, "A Rationale of Criminal Negligence" 32 Ky.L.Jour. 141, footnote 191. How then can a jury, without any sort of a standard of culpability, even pretend to be able to discover and apply a standard evolving from a "failure to perceive."

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). The section of the Penal Law of New York subject herein is "so obscure in is prohibitions that persons potentially subject to it cannot know with fair assurance how to act to avoid liability." Amsterdam, "Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers And The Like," 3 Crim.Law.Bul. 217.

In examining the statutory criteria one easily sees a major flaw in its language. The statute is not one whose ambiguity and newness can be cured. It is susceptible of continuing irregularity in the course of administration by both judge and jury. "Here is the coercive force of society run loose at the whim of prosecutor and jury, without adequate restraint at the level of the trial court (for want of standards by which to restrain) . . ." Amsterdam, "The Void-for Vagueness Doctrine," 109 Univ.Pa.L.Rev. 91 Fn. 120 in discussion of *Edelman* v. *California,* 344 U.S. 357 (1953). In the second trial of the subject case the jury had to request clarifying instructions. The Judge did not give them clarifying instructions because he could not do so.

Such lack of notice and restraint, as contained in Penal Law §125.10 seriously clouds, in fact makes near impossible, federal review of the administration of justice by state judges and juries. "[S]tatutory standards which by reason of indefiniteness fail to provide crisp legal framing of factual issues have the Court in a virtually impossible pose." Amsterdam, *ibid.* p. 80. Overreacting of authority by state judges and juries remain concealed behind sweeping statutes such as that at the Bar.

"An over-vague criminal law licenses the jury to create its own standard in each case." *Herndon* v. *Lowry,* 301 U.S. 242, 263 (1967). The propensity of the statute involved in this case is to fall completely within the ambit of *Herndon,* that is, encouraging arbitrary conviction. There is no standard applied to petitioner to take him across the line from civil liability to criminal liability. The legislature has turned the definition of criminally negligent homicide over to the judge ". . . the criminality

of an act cannot depend upon whether a jury may think it reasonable or unreasonable." *People* v. *Charles Austin, Inc.*, 307 Mich. 456, 3 N.W.2d 841.

Petitioner was convicted because the jury felt he was unreasonable. When the idea of reasonableness arises we are in the realm where "the equilibrium between the individual's claims of freedom and society's demands upon him left to be struck *ad hoc* on the basis of a subjective evaluation . . ." Amsterdam, *supra* at p. 93. In the case of the statutes the subjectiveness is all that exists. There is no objective framework. The conviction turns on the judge's interpretation through his charge to the jury or what the jury "really feels." Because of the lack of standards judge and jury have free reign to exercise every whim and caprice of the moment. As this Court stated, "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). But what does the state forbid in our case, a "failure to perceive" which failure is unreasonable or unjustifiable or leads to a substantial risk. These words are merely that—words without meaning, applied arbitrarily jury by jury, judge by judge.*

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* There are two prior New York cases dealing with the statute in question. Neither one is helpful. *People of the State of New York* v. *Haney*, 30 N.Y.2d 328, 33 N.Y.S.2d 403 (1972), discussed Penal Law §125.10 as it ruled on a sufficiency of evidence question. The constitutional issues were not raised or discussed. 30 N.Y.2d at page 335.

In *People* v. *Buffington*, 304 N.Y.S.2d 746, 61 Misc.2d 429 (1969), reversed on other grounds 35 App. Div. 1063, 316 N.Y.S.2d 481, the trial judge, after examining the change from "conscious disregard" (the old law) to "failure to perceive" (the new law) and the legislative history of the subject ("the annotators admit,

As this Court stated in *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162, 92 S. Ct. 839, 843, 31 L. Ed.2d 110, a penal law is void for vagueness when it " 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . .' *United States* v. *Harris,* 347 U.S. 612, 74 S. Ct. 808, 812, 98 L. Ed. 989." Penal Law §125.10 does not reach such a standard. There simply is no way a man of ordinary intelligence could read the subject statute and know what he must do. (Cf. *United States* v. *Brewer,* 139 U.S. 278, 288, 11 S. Ct. 538, 541, 35 L. Ed. 190.) Is a man who takes his car out, not having it inspected before he drives it in this instance, and his tires are worn leading to a blowout and subsequent accident, guilty of being criminally negligent? And if he does precisely the same thing but has no blowout, is he guilty of attempted criminal negligence? *Buffington* in response would say "it is asking too much of the fact-finding process not to determine if an act was or was not done, but to select which acts are crimes and which are

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with commendable candor, that the section as written is incapable of any real clarification" 304 N.Y.S.2d at 757) states:

> "The frankly admitted existence of 'tautological articulation,' 'inevitable ambiguity' and 'begging the question' where clarity is essential and confusion abhorrent is precisely the kind of draftsmanship which invites speedy burial. The contrast with the deliberate and painstakingly evolved definition of criminal negligence previously developed by the courts is too striking to be ignored. There is neither excuse nor justification for such legislative obscurity and small comfort, if any, in telling a man that although he has been convicted for a loosely defined perceptual error, he is not being punished quite so severely as other homicides. Standards for a crime so new in concept and application should be articulated with precision and care . . . Instead, we have a definition of culpability 'that would . . . be the envy of those monastics whose hitherto favorite pastime had been debating the number of angels who might dance on the head of a pin.' "

not . . . [we] must not leave it for the judge or jury to guess at: we are obliged to be judged solely by the whim of the hour" 304 N.Y.S.2d at 759 citing *People* v. *Grogan*, 260 N.Y. 138, 147, 183 N.E. 273, 276.

Perhaps, years ago in *Cline* v. *Frink Dairy Co.*, 247 U.S. 445, 446 (1927) this Court stated the dilemma posed by statutes such as these as:

> "It will not do to hold an average man to peril of an indictment for the unwise exercise of his, . . . knowledge involving so many factors of varying effect, that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result."

This statute will not do. Penal liability is a severe consequence. "Failure to perceive" concerns itself with theory applied arbitrarily. The statute is void because it is vague.

CONCLUSION

For the reasons stated above certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

Of Counsel:

MARTIN GARBUS, Esq.
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APPENDIX

Decision of the Court of Appeals

Nov. 21, 1973

No. 94

THE PEOPLE & c.,

Respondent,

vs.

EUGENE KEALEY,

Appellant.

Order affirmed.

No opinion.

All concur.

Remittitur of the Court of Appeals

No. 94

COURT OF APPEALS

State of New York, ss:

Pleas in the Court of Appeals held at the Court of Appeals Hall, in the City of Albany, on the 21st day of November, in the year of our Lord one thousand nine hundred and seventy-three, before the Judges of said Court.

Witness,

The Hon. Stanley H. Fuld,
Chief Judge, Presiding

James M. Flavin, Clerk.

Remittitur November 21, 1973

No. 94 73

The People &c.,

Respondent,

vs.

Eugene Kealey,

Appellant.

Be it Remembered, That on the 8th day of February in the year of our Lord one thousand nine hundred and seventy-three, Eugene Kealey, the appellant—in this cause, came here unto the Court of Appeals, by Dawson &

Schwartz, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People, & c., the respondent in said cause, afterwards appeared in said Court of Appeals by William Cahn, D.A., Nassau County.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Richard B. Schwartz, of counsel for the appellant—, and by Mr. Henry P. DeVine, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Nassau County, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Nassau County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, & c.

JAMES M. FLAVIN
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,)
Albany, November 21, 1973.)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

JAMES M. FLAVIN
Clerk.

Decision of the Appellate Division of the Supreme Court, Second Judicial Department

(336 N.Y.S.2d 440)

THE PEOPLE, etc.,

Respondent,

v.

JOSEPH T. KEELEY,

Appellant.

Supreme Court, Appellate Division, Second Department. Oct. 16, 1972. Order of the County Court, Nassau County, dated December 31, 1969, affirmed. No opinion.

LATHAM, Acting P.J., and SHAPIRO, GULOTTA, CHRIST and BRENNAN, JJ., concur.

Order Staying Judgment of Conviction

COURT OF APPEALS
OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

EUGENE F. KEALEY,

Defendant-Appellant.

The above named Defendant-Appellant, EUGENE F. KEALEY, having made an application before me for an Order Staying the Execution of the Judgment of Conviction of the County Court of Nassau County rendered on the 3rd day of May, 1971, convicting him of the crime of criminally negligent homicide, which conviction was affirmed by the Appellate Division, Second Department on the 6th day of March, 1972, and which conviction was affirmed by the Court of Appeals on the 21st day of November, 1973, and permitting him to continue at large with bail fixed at $1,000.00, and a question of the Constitutionality of Section 125.10 of the Penal Law having been contained in both the appeal to the Appellate Division and the appeal to the Court of Appeals and necessarily decided upon

Now, upon motion of DAWSON & SCHWARTZ, Esqs., attorneys for Defendant-Appellant, it is

ORDERED, that Execution of the Judgment of Conviction herein is stayed for a period of thirty (30) days from the date of this Order with Notice of Entry thereof to Appellant's Counsel; and if during this thirty (30) day period application is made to the United States Supreme Court for a Writ of Certiorari, it is further

ORDERED, that the Execution of the Judgment of Conviction herein is stayed pending determination in the United States Supreme Court for Appellant's Writ of Certiorari, and it is further

ORDERED, that during the period of stay aforesaid Appellant shall be entitled to continue at large with bail fixed at $1,000.00.

ENTER:

SOL WACHTLER
Associate Judge of the
Court of Appeals

Dated Nov. 29, 1973

...ME COURT, U. S.

JAN 11 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-979

EUGENE KEALEY,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-979

EUGENE KEALEY,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Eugene Kealey, prays that a writ of certiorari shall issue to review a judgment of the New York State Court of Appeals entered on November 21, 1973, affirming the decision of the Appellate Division of the Supreme Court, Second Judicial Department, which, in turn, affirmed a judgment of conviction of petitioner in the County Court, Nassau County, of Criminally Negligent Homicide. Petitioner received an indeterminate sentence of up to 3 years and was admitted to bail pending the appeal. Petitioner remains at liberty on bail at the present time.

Opinions Below

There were no published reports or opinions in the County Court, Appellate Division, or the New York State Court of Appeals.

Jurisdiction

The jurisdiction of this Court is apparently sought pursuant to 28 U.S.C., § 1257, subd. 3, it being argued that § 125.10, Penal Law, State of New York, defining a criminally negligent homicide is so vague and obscure as to violate the due process clause of the Fourteenth Amendment and Article I, § 9, as well.

Introduction

Richard Lucey and Margaret Gribben were traveling in a northerly direction on Bayville Road at 6 P.M. the evening of September 14, 1968, in a Chrysler automobile. They were accompanied by Richard Miller, Mrs. Gribben's grandson, and his pet dog. The Chrysler was struck in the left rear by the right front of appellant's Ford as appellant attempted to pass. The Lucey Chrysler was catapulted into a tree on the easterly side of the road killing the pet dog and Mrs. Gribben instantly. Mr. Lucey died the same night in a nearby hospital. The grandson, Richard Miller, was seriously injured but survived. Appellant's Ford spun around and came to rest in a southbound lane facing south.

Petitioner insists § 125.10, Penal Law, which defines the substantive crime of Criminally Negligent Homicide is so indefinite and uncertain as to fail to give notice to motorists and others in New York of the conduct to be avoided. More particularly, it is argued that the test or standard as construed by the New York State Court of

Appeals is itself so uncertain as to fail the test of the Fourteenth Amendment. The respondent argues to the contrary.

The Evidence

THOMAS HICKEY (639, *et seq.*) is the proprietor of a Shell Gas Station in Locust Valley who testified that at 6 P.M. the evening of September 14, 1968, appellant drove up to the station in a new blue Ford and ordered $2 worth of gasoline. Mr. Hickey filled the order but the defendant complained that he had asked for $3 worth of gas. Mr. Hickey put the additional gas in the car and gave appellant a card which the gasoline company had been giving out to its customers during a promotion. Mr. Hickey testified appellant slapped $3 into his hand, threw away the promotion card, and sped off at a high rate of speed. According to the witness, appellant left tire marks on the street as he spun the wheels so rapidly.

Mr. Hickey observed appellant for six to eight minutes and noted appellant's eyes were very bloodshot, his face very red, and he could smell a strong odor of intoxicating liquor as appellant spoke with him. In Hickey's opinion Kealey was intoxicated.

It is undisputed that after leaving the Hickey gas station, appellant made his way to Bayville Road and was traveling in a northerly direction from Locust Valley to Bayville.

The first eyewitness summoned by the District Attorney was DANIEL SIMONE (271, *et seq.*) who testified that he was traveling north on Bayville Road in the passing lane, directly to the rear of appellant. Simone described Bayville Road as a four-lane highway, running generally in a north-south direction. There were no improved parking

areas on the shoulder of the road. Instead, it was lined with shrubbery and trees.

Continuing, Simone testified that appellant moved to the inside lane so he started to pass when suddenly appellant swung back in front of him and continued across the double yellow line in the middle of the road into the fast lane of the southbound traffic (275-277).

Simone watched appellant and according to the witness, he kept drifting to his left until he reached the inside lane of the southbound traffic (277), where appellant swerved back across the passing lane southbound, and continued across the double yellow line into the passing lane northbound (278).

Continuing, Simone testified appellant veered partway into the curb or slow lane nearly colliding with a little red car that was heading north in the slow lane (279-280).

Simone continued to observe appellant's operation of his new blue Ford, and he testified that appellant next veered west away from the little red Saab until he straddled the double yellow line dividing the north and southbound traffic (280). Simone was traveling at 35-40 m.p.h. and appellant was traveling faster.

According to Mr. Simone, he watched appellant disappear over the crest of a rise, still straddling the double yellow line. Simone next saw appellant at the death scene a short distance beyond the rise in the road.

BRIAN GARY HENDRICKSON (342, *et seq.*) was driving his 1962 Ford northbound on Bayville Road in the curb lane when he saw appellant's blue Ford straddle the double yellow line. According to Hendrickson, appellant's car drifted over to the curb line northbound, then back to the double yellow line, where appellant weaved back and forth

(347-348). The witness estimated the speed at 45 m.p.h. (347). Hendrickson also noticed the little red Saab and he testified that as the appellant attempted to pass, he went across the double solid line completely into the fast lane of the southbound traffic, and then came back across the double yellow line into the fast lane northbound. Hendickson lost sight of appellant as he went over a rise. Next "I heard an explosion, it sounded like an explosion, a loud thump, and I continued over the crest of the hill on Bayville Road. I noticed a blue Chrysler on the right hand side up against a tree. That's it" (352).

The third eyewitness was REGINALD SCHULTZ (389, *et seq.*), the driver of the little red Saab. According to Mr. Schultz, he was driving slowly on Bayville Road in the curb lane towards Bayville in a northerly direction when appellant passed him and swerved over into the passing lane southbound, then back into the passing lane northbound where appellant came close to the left rear fender of still another car directly in front of him (390).

According to Mr. Schultz, appellant then swung back across the double yellow line almost to the curb or outside lane southbound (391). Mr. Schultz testified that appellant actually traveled back and forth across the four lanes of the highway over a distance of approximately ¾ths of a mile (392).

Mr. Schultz discovered the accident when he came over the incline in the road (394).

The fourth eyewitness was THOMAS D. PEIFFER (525, *et seq.*), Director of Athletics at Locust Valley High School. Mr. Peiffer testified he was driving in a northerly direction towards Bayville behind the death car at 35-40 m.p.h. for two to three miles when suddenly appellant passed him traveling north but in the southbound passing lane. Mr.

Peiffer was attracted to appellant's car, and he testified that appellant came back across the double yellow line to a point to the rear of the death car when appellant started to swing back across the street. It was at this point that appellant hit the left rear of the death car with his right front. According to Mr. Peiffer, the death car immediately shot off the road into a tree, whereas appellant's Ford spun around and came to rest in the southbound lane facing south.

The final eyewitness, FRED IZZOLO (681, *et seq.*) had just passed the death car heading north on Bayville Road, and was swinging back into the curb lane when he looked in his rear view mirror and saw appellant slam into the left rear of the death car. According to Mr. Izzolo, "It was like a double impact. A double shot * * two contacts * * close together * * it just happened so fast, the Chrysler [boomeranged away] like a slingshot, away from the first impact and then the second impact and it slingshotted away from the road" (686).

The Death Scene

It is undisputed the death car was catapulted into a tree bordering the road killing the pet dog and Mrs. Gribben instantly. Mr. Lucey died two hours later at the Glen Cove Hospital and Mrs. Gribben's grandson, Richard Miller, was severely injured but recovered. According to the Miller lad, he and his puppy were sitting in the back seat on the way to dinner at Bayville with his grandmother when the accident occurred; the next thing he remembers coming to in the Glen Cove Hospital (265, *et. seq.*).

DR. PAUL ROSSANO (586, *et seq.*) lived nearby the accident scene. He testified he pronounced Mrs. Gribben and the dog dead at the scene. It was stipulated

DR. R. J. MUOJO (639, *et seq.*) would testify Mr. Lucey died at the Glen Cove Hospital at 8:40 P.M. about two hours after the accident.

DR. DANIEL MCCARTHY (608, *et seq.*) performed the autopsies and discovered Mr. Lucey and Mrs. Gribben died from spinal fractures which could have been caused by the accident.

Evidence of Intoxication

In addition to the erratic operation of the car, it was appellant's physical appearance at the scene as much as anything else that sealed his doom. For example, EVERETT HAWTHORNE (550, *et seq.*), the publisher and editor of a small weekly newspaper called the "Bayville Times and Common Sense" came upon the accident scene and discovered appellant was drunk (558). He reached this opinion because he "noticed a very heavy odor of digested alcohol on the gentleman's breath" (553). His judgment that appellant was intoxicated was corroborated by appellant's appearance when he got out of the car. According to Mr. Hawthorne, appellant was held up by two police officers who had a hold of him under each arm. His legs were dragging and he was not walking in a normal fashion (556-557).

Mr. Hawthorne also testified defense counsel at the trial, Terence Gaffney, was at the scene. The editor's opinion that appellant was badly intoxicated and incapacitated was corrborated by LIEUTENANT JOHN KETELTAS (416, *et seq.*) who testified that when he found the appellant at the scene, appellant's speech was slurred and unintelligible.

According to the Lieutenant, appellant was mumbling, his eyes were glazed, his face flushed, and he smelled alcohol on the appellant's breath.

The Lieutenant was substantiated by PATROLMAN WALTER DUCHNOWSKI (437, *et seq.*) and PATROLMAN SEBASTIAN CORUZZI (450, *et seq.*) who assisted appellant from his auto to the police vehicle. According to each of the patrolmen, appellant's speech was slurred, his eyes bloodshot, and he reeked of alcohol. Each patrolman testified appellant staggered when he tried to walk, and in their opinion was very intoxicated.

The Defense

EUGENE KEALEY (869-921) took the stand in his own behalf and testified that on September 14, 1968, during mid-afternoon, he was at his home, 2 Meleny Road, Locust Valley, with a neighbor-friend Leay (869-71).

Leay had a gin and the defendant had a beer, the defendant claiming he had drunk nothing at all up to that time (870-71).

His wife, out most of the day, returned (871) and Kealey stated he left his home about 5:10 or 5:15 P.M. to go shopping (871-72).

Kealey said he first drove his new Ford to Phil's Sport Shop in Glen Cove, then to the cleaners (872-77), and next to a Shell gasoline station where his gas tank was filled up, and he paid with a $10 bill (874).

Kealey swore he had no conversation with anyone at the gas station and Mr. Hickey's version of what transpired was totally incorrect (874, 882-83, 893).

Kealey then travelled to a liquor store, and bought a quart of gin (874-75).

From the liquor store, Kealey drove to a road leading to Horse Hollow Road which, in turn, continued into the Bayville Road (875).

The defendant claimed his speed on the Bayville Road was between 35 to 40 miles per hour and he did not recall passing any vehicles on the Bayville Road (876).

Kealey claimed he was driving in the right lane heading north on the Bayville Road, intending to make a right turn into Meleny Road, when he remembered he had to get some milk and bread in Bayville (877).

According to him, he pulled out to pass a car which sort of moved in front of him and then slowed down, at which time his car struck the other car (877-78, 906, 909).

There was another, he claimed almost instantaneous, collision with this car, and he next remembered waking up on the other side of the road, where he noticed an ambulance light on the other side of the road (878).

Kealey vaguely remembered getting into a Police car and going to a Police station (878-79).

He did recall he had been arrested and booked through to headquarters in Mineola, whereafter he was bailed out that night (878-79).

After being bailed out, he went to Mr. Leay's house and contacted a doctor, after which he was admitted to Oyster Bay Hospital (879).

Kealey said he had a tremendous headache at the time (880), and that he was discharged from the hospital on Monday (880).

On cross-examination, Kealey, contrary to his direct testimony (876), testified he did pass cars on the four-lane Bayville Road (898, 900-02).

Kealey grudgingly conceded he might have gone over the double line a foot or so in passing these cars because of the narrowness of the lanes or highways (902).

Kealey contended the testimony of Messrs. Simone, Schultz and Hendrickson, with respect to the erractic manner of his driving, was incorrect (903, 904).

To complete his exculpatory attempt, Kealey stated the witnesses who said the Chrysler was in the slow or curb lane when it was hit, were in error (910, 921).

JEAN KEALEY (783-802), the defendant's wife testified there was nothing unusual about her husband's condition, and she detected no odor of alcohol about him that late afternoon (784-90).

Her husband left the house about 5:15 to do some shopping in Glen Cove and Bayville, and dinner was to be about 6:15 or 6:30 P.M. (784-85).

Mrs. Kealey agreed that the Bayville Road was a narrow, four-lane highway, having no shoulders, and with trees growing very close to the edge of the road (801).

Mrs. Kealey had no personal knowledge of whether her husband had anything to drink while she was gone or out of his presence (790).

Eventually there came a time when she became aware of the collision. At the scene, she saw her husband looking straight ahead. She asked him if he was okay. He didn't say anything to her then. He had an ashen look, and his good wife did not detect the odor of alcohol emanating from her husband (786, 793).

The defendant later complained of headaches, still looked ashen, so he went to the Oyster Bay Hospital where he was admitted and subsequently released on Monday (787-89).

On cross-examination, the prosecutor asked Mrs. Kealey whether or not her husband was a heavy drinker, to which

immediate objection was interposed, and sustained, without any answer being given by the witness (794).

Counsel then moved for a mistrial, and a colloquy was had in the absence of the jury, at the conclusion of which the motion was denied and the jury instructed to disregard the question, that answers and not questions were the evidence they were to consider (795-97).

JOHN LEAY (846-67), formerly a neighbor, and still a good friend of the defendant (864), testified he was with the defendant between 2 and 3:30 P.M. on September 14, 1968, during which time he did not smell any alcohol on the defendant (848) or notice anything unusual about him (848-49).

Leay and Kealey went to the kitchen for a drink. There was only enough gin for one drink, which Leay consumed with tonic, whereas the defendant had a can of beer (849).

Leay left Kealey at about 4 P.M. and later, after hearing the noise of the collision, saw defendant's car on the opposite side of the Bayville Road (850-52, 863).

Kealey appeared dazed and his complexion was pale, the witness saying he could not understand the defendant's answers (853, 864).

Kealey's good friend claimed the Police pulled the defendant out of his car but defendant got into the Police car without any assistance. He also heard the defendant state he was waiting for a doctor (855-59, 866).

DAVID ARMSTRONG (808-20), the manager of Phil's Sport Shop in Glen Cove (803), testified that at about 5:30 to 5:40 P.M. on Saturday, September 14, 1968, the defendant came to his store and bought some merchandise (803-09).

The defendant remained in the store for about 20 minutes, departing about 5:55 or 6 P.M. (803-06).

The witness merely measured Kealey's waist. The witness was in a hurry to get the defendant in and out of the store, had no reason to check on the defendant's condition, and he was not really eyeing or examining Kealey very closely (816-19).

Based on this minimal conduct and observation, Armstrong could not say he had detected any odor of alcohol about the defendant or that defendant's speech, motion, etc. were unusual (805, 807-10).

IRVING WALLACH (749-59), the manager of a cleaning store in Glen Cove on the day in question (749-50), testified he closed up his store and went outside a few minutes after 6:00 P.M., when the defendant pulled up near the store (750). Mr. Wallach merely asked the defendant whether he wanted the witness to reopen the store to get Kealey's cleaning and Kealey replied he'd be back Monday for his clothing, and left (750).

This entire outdoor encounter took less than a minute (755), and Mr. Wallach did not take note of the defendant's condition, didn't smell his breath, and could only recall that the defendant's speech appeared to be alright and did not appear any different than he normally did (751, 755-56).

HENRY WALTER, JR. (759-73), connected with the Dupree Liquor Store in Locust Valley on September 14, 1968, testified that at about 6:20 P.M. the defendant came into his store and the witness induced the defendant to buy a quart of gin since the quarts were on sale (760-62).

Mr. Walter further testified there were very few words spoken between himself and Kealey, the defendant being in the store for no more than 3 or 4 minutes (763, 769-70).

Mr. Walter saw no evidence of defendant being intoxicated, observed nothing unusual about defendant's speech,

demeanor or walk, although he conceded when he did have his few words with the defendant they were separated by a store counter, which was at least 3 feet wide (73-64, 770). Walter assumed Kealey was not intoxicated that night (770-71).

Walter, familiar with the area, said one could drive 40 miles per hour on Horse Hollow Road and the Bayville Road and could get to the scene of the collision from the liquor store within 7 minutes (769).

Moreover, Walter further testified the defendant purchased a bottle of liquor about once a week average (771).

DR. JOSEPH BEBRY (926-46), a surgeon, testified he saw the defendant at the Oyster Bay Hospital at about 1:15 A.M., after the occurrence, and his admitting diagnosis, *inter alia*, was a cerebral concussion (929-30, 944).

However, there were no tests performed to confirm the concussion diagnosis; only a visual, physical examination (930). X-Rays of Kealey's skull proved negative (935).

Bebry, regarding causes of odors which could smell like alcohol, conceded there was no evidence of blood in the defendant's mouth; no evidence the defendant was a diabetic; and obviously no evidence of the defendant being poisoned by carbon monoxide (933, 935-37, 940-44).

DR. RICHARD GRIMES (827-46) testified as an expert witness and generally agreed with Dr. McCarthy's findings, that the accident was the competent producing cause of death of the victims, but disagreed with the opinion of Dr. McCarthy concerning the cause of the spinal injuries inflicted upon both victims (829-34, 844).

Dr. Grimes also testified a person in post-traumatic shock with a concussion could have symptoms similar to those observed in alcoholism (837-38).

However, if alcohol was smelled on one's breath, a diagnosis of intoxication would be equally consistent (837-38).

One of the symptoms of a concussion would be palor (834-44).

The doctor believed there would be no difference in the smell of a person's breath whether he had one or twenty drinks (839).

In examining the autopsy report concerning Mr. Lucey's liver, Dr. Grimes stated this represented something commonly seen in chronic alcoholism, although it could be due to other causes (834).

Dr. Grimes clearly indicated he placed no value on a layman's opinion as to whether or not another person was intoxicated. The doctor believed a medical opinion would be more valid (846).

Reasons for Denying the Writ

Petitioner insists certiorari should issue because the constitutionality of the statutes involved, i.e. § 125.25, Penal Law, and § 15.05, subd. 4, Penal Law, have not been construed by the courts of New York. More particularly, petitioner contends that similar statutes exist in Illinois, Wisconsin and Michigan (7) so the issues are of importance not only to motorists of New York, but elsewhere in the United States as well. The respondent contends certiorari should be denied because the statutes involved have been construed by the New York State Court of Appeals consistent with the minimum requirement of the Fourteenth Amendment. Further, the New York State Court of Appeals has not construed § 125.10 or § 15.05, subd. 4, in a way that would violate any provision of the Constitution

of the United States. Resolution of the issues requires a review of the old statutes and settled case law in New York, plus a close appraisal of the new statutes dealing with vehicular homicide.

The idea that indefiniteness in a criminal statute violates the Fourteenth Amendment of the Constitution of the United States does not seem to have been considered by the United States Supreme Court until the latter part of the nineteenth century. One of the earliest pronouncements on the subject appears in *United States* v. *Brewer* [1891] 139 U.S. 278. The *Brewer* case was a prosecution for election fraud under a Tennessee statute. By way of dicta on page 288, the Court said:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. *United States* v. *Sharp*, Pet. C.C. 118."

With the turn of the century, the question was squarely before the Court in *Waters-Pierce Oil Co.* v. *Texas* [1909] 212 U.S. 86. Following the decision in the *Waters-Pierce Oil Co.* case, more and more of the Court's time has been taken up by the problem of indefiniteness in penal statutes. The general rule is the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties (*Nash* v. *United States* [1913] 229 U.S. 373; *International Harvester Co.* v. *Kentucky* [1914] 234 U.S. 216; *Omaechevarria* v. *Idaho* [1918] 246 U.S. 343; *United States* v. *L. Cohen Grocery Co.* [1921] 255 U.S. 81; *Connally* v. *General Construction Co.* [1926] 269 U.S. 385; *Whitney* v. *California* [1927] 274 U.S. 357; *United States* v. *Wurzbach* [1930] 280 U.S. 396; *Chaplinsky* v. *New Hampshire* [1942] 315 U.S. 568). Statutes

may be indefinite as to the persons subject thereto (*Lanzetta* v. *New Jersey* [1939] 306 U.S. 451) or the conduct to be avoided (*Winters* v. *New York* [1948] 333 U.S. 507). It will be noted that there does not seem to be any material difference of opinion in the Supreme Court as to the rule although the Court has frequently divided as to its effect in a given case (*Nash* v. *United States, supra; International Harvester Co.* v. *Kentucky, supra; Omaechevarria* v. *Idaho, supra; Connally* v. *General Construction Co. supra; Winters* v. *New York, supra*).

In *Winters* v. *New York, supra,* the Supreme Court reversed a judgment of conviction under § 1141, subd. 2 of the former Penal Law of the State of New York because the statute was indefinite. Although Judge Frankfurter, in a dissenting opinion joined in by Judge Jackson and Judge Burton, differed with the majority as to the effect of the rule on the statute, so much of his opinion as deals with the rule itself is not disputed. It may be taken as an accurate statement of the law and constitutes one of the clearest discussions of the principle of indefiniteness found in any of the pronouncements of the Supreme Court. Appearing on pages 524, 525 and 526, I quote:

> "Fundamental fairness of course requires that people be given notice of what to avoid. If the purpose of a statute is undisclosed, if the legislature's will has not been revealed, it offends reason that punishment should be meted out for conduct which at the time of its commission was not forbidden to the understanding of those who wished to observe the law. This requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the conception of

'due process of law'. The legal jargon for such failure to give forewarning is to say that the statute is void for 'indefiniteness.'

"But 'indefiniteness' is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept. There is no such thing as 'indefiniteness' in the abstract, by which the sufficiency of the requirement expressed by the term may be ascertained. The requirement is fair notice that conduct may entail punishment. But whether notice is or is not 'fair' depends upon the subject matter to which it relates. * * * That which may appear to be too vague and even meaningless as to one subject matter may be as definite as another subject matter of legislation permits, if the legislative power to deal with such a subject is not to be altogether denied. * * *

"In these matters legislatures are confronted with a dilemma. If a law is framed with narrow particularity, too easy opportunities are afforded to nullify the purposes of the legislation. If the legislation is drafted in terms so vague that no ascertain able line is drawn in advance between innocent and condemned conduct, the purpose of the legislation cannot be enforced because no purpose is defined. * * * The reconcilation of these two contradictories is necessarily an empiric enterprise largely depending on the nature of the particular legislative problem.

"What risks do the innocent run of being caught in a net not designed for them? How important is the policy of the legislation, so that those who really like to pursue innocent conduct are not likely to be

> caught unaware? How easy is it to be explicity particular? How necessary is it to leave a somewhat penumbral margin but sufficiently revealed by what is condemned to those who do not want to sail close to the shore of questionable conduct? These and like questions confront legislative draftsmen. Answers to these questions are not to be found in any legislative manual nor in the work of great legislative draftsmen. They are not to be found in the opinions of this Court. These are questions of judgment, peculiarly within the responsibility and the competence of legislatures. The discharge of that responsibility should not be set at naught by abstract notions about 'indefiniteness.' "

The Court reviewed a conviction in *People* v. *Mancuso* [1931] 255 N.Y. 463, for participating as directors in the fraudulent insolvency of a monied corporation in violation of § 297, subd. 1 of the Penal Law. Speaking for the Court on page 470, Judge Cardozo said of indefiniteness:

> "The act is not shorn of certainty of meaning by its reference to a standard of customary diligence. The power of the Legislature to make it a crime for banking officers to be so neglectful of their duties as to involve their banks in ruin is hardly to be doubted. The power existing, one is at a loss to imagine how the prohibited omissions could be more accurately stated, without a catalogue of particulars not susceptible of enumeration in advance of the event (cf. *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, at 223). 'The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.' (*Nash* v. *United States*, 229 U.S. 373, 377.) 'The precise course of the line may be uncertain, but

> no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk' (*United States* v. *Wurzbach*, 280 U.S. 396, 399). Much will depend on the distinction whether the standard is an old one, long recognized in law and life (*International Harvester Co.* v. *Kentucky*, 234 U.S. 219, 223), or one novel and unfamiliar, not yet approaching certainty, at least in measurable degree, through habitude and example."

In *People* v. *Grogan* [1932] 260 N.Y. 138, the Court reviewed a conviction of Reckless Driving under § 58 of the Vehicle and Traffic Law. The statute was attacked on the ground of indefiniteness. In upholding the constitutionality of § 58, Judge Crane speaking for the Court on pages 145 and 146 stated:

> "Statutes which create crimes must be definite in specifying conduct which is condemned or prohibited. They must afford some comprehensible guide, rule or information as to what must be done and what must be avoided, to the end that the ordinary member of society may know how to comply with its requirements. 'Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.' (*United States* v. *Brewer*, 139 U.S. 278, 288; *Nash* v. *United States*. 229 U.S. 373; *International Harvester Co.* v. *Kentucky*, 234 U.S. 216; *McBoyle* v. *United States*, 283 U.S. 25-27; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 459). In the latter case Chief Justice Taft said 'generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having

> a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, * * * or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, * * * or, as broadly stated by Mr. Chief Justice White in *United States* v. *Cohen Grocery Co.* (255 U.S. 81, 92), 'that for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, *a standard of some sort was afforded.*' "

More recently, the Court addressed itself to the constitutionality of a disorderly conduct ordinance in the City of Dunkirk and said (*People* v. *Diaz* [1958] 4 N.Y. 2d 469, p. 470):

> "It is the rule that for validity a criminal statute must be informative on its face (*People* v. *Firth*, 3 N.Y. 2d 472) and so explicit that 'all men subject to its penalties may know what acts it is their duty to avoid.' "

In *People* v. *Pagnotta* [1969] 25 N.Y. 2d 333, Judge Jasen wrote (p. 337):

> "* * * a statute must be sufficiently definite to give a reasonable man subject to it notice of the nature of what is prohibited and what is required of him."

Testing § 125.10 and § 15.05, subd. 4, by the foregoing general rules suggests the statutes are not so uncertain or indefinite as to be unconstitutional.

History and Prior Law

Initially, death due to an automobile accident was prosecuted as Manslaughter Second Degree (§ 1052, subd. 3, Penal Law), the statute reading as follows:

> "Such homicide is manslaughter in the second degree, when committed without a design to effect death: by any act, procurement or culpable negligence of any person which, according to the provisions of this article does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree."

It has been judicially acknowledged that trial judges, prosecutors and others experienced at the trial level found juries were reluctant to convict (1) because the act was labeled manslaughter; and (2) because of the severity of the sentence (*People* v. *Decina* [1956] 2 N.Y. 2d 133; p. 147; *People* v. *Williams* [1946] 187 Misc. 299).

To remedy the situation, the New York State District Attorneys Association recommended to the Legislature that a special statute be adopted to deal exclusively with vehicular homicides involving culpable negligence (*supra*). Section 1053-a followed (Laws 1936, Ch. 733) providing:

> "A person who operates or drives any vehicle of any kind in a reckless or culpably negligent manner, where a human being is killed, is guilty of criminal negligence in the operation of a vehicle resulting in death."

Although dissenting, Judge Desmond's comments in *People* v. *Decina (supra)* regarding the history of § 1053-a were accurate. The judge there noted (p. 147):

> "The purpose of and occasion for the enactment of § 1053-a is well known (see Governor's Bill Jacket on L. 1936, Ch. 733). It was passed to give a new label to, and to fix a lesser punishment for, the culpably negligent automobile driving which had formerly been prosecuted under section 1052 of the

> Penal Law defining manslaughter in the second degree. It has been found difficult to get manslaughter convictions against death-dealing motorists."

It will be seen that § 1053-a was directed to the operation of a vehicle in a "reckless or culpably negligent manner" and to spell out a *prima facie* case the evidence must establish "something more than the slight negligence necessary to support a civil action for damages" (*People* v. *Bearden* [1943] 290 N.Y. 478, p. 482), for "A distance separates the negligence which renders one criminally liable from that which establishes civil liability." (*People* v. *Bearden, supra*, p. 483; *People* v. *Rosenheimer* [1913] 209 N.Y. 115, p. 123; *People* v. *Eckert* [1956], 2 N.Y. 2d 126, p. 130; *Brown* v. *Shyne* [1926] 242 N.Y. 176, pp. 182-183; *People* v. *Pace* [4th Dept. 1927] 220 App. Div. 495, p. 497).

The negligence must be culpable and reckless to bring the defendant into the prohibition of § 1053-a and of negligence which is culpable it has been said that it is such as is deserving blame, censure, condemnation and punishment (*People* v. *Angelo* [1927] 246 N.Y. 451, p. 453; *People* v. *Eckert* [1956] 2 N.Y. 2d 126, p. 130), so that it reaches "beyond the bounds of lack of skill and foresight where civil liability begins to a point where criminal liability is imposed because the negligence is not merely venial but is 'culpable', involving fault for which the State may demand punishment" (*Brown* v. *Shyne* [1926] 242 N.Y. 176, p. 183; *People* v. *Angelo* [1927] 246 N.Y. 451, p. 457; *People* v. *Eckert, supra*, p. 130).

"Mere lack of foresight, stupidity, irresponsibility, thoughtlessness, ordinary carelessness, however serious the consequences may happen to be, do not constitute culpable negligence. There must exist in the mind of the accused

at the time of the act or omission, a consciousness of the probable consequences of the act, and a wanton disregard of them" (*People* v. *Carlson* [Co. Ct. Kings Co. 1941], 176 Misc. 230, p. 232).

"Culpable negligence is therefore something more than the slight negligence necessary to support a civil action for damages. It *means, disregard of the consequences which may ensue from the act, and indifference to the rights of others*" (italics mine). (*People* v. *Angelo* [1927] 246 N.Y. 451, p. 457; *People* v. *Bearden* [1943] 290 N.Y. 478, p. 482; *People* v. *Grogan* [1932] 260 N.Y. 138, pp. 144-145; *People* v. *Eckert* [1956] 2 N.Y. 2d 126, p. 130; *People* v. *Gardner* [4th Dept. 1939], 255 App. Div. 683, 685).

The sufficiency of the evidence has been before the courts on numerous occasions, sometimes by way of appeal (*People* v. *Bearden, supra; People* v. *Angelo, supra, People* v. *Eckert, supra; People* v. *Decina* [1956] 2 N.Y. 2d 133), and sometimes by way of a motion to inspect the Grand Jury minutes (*People* v. *Curnuch* [Co. Ct. Kings Co. 1941], 177 Misc. 606; *People* v. *Carlson* [Co. Ct. Kings Co. 1941], 176 Misc. 230). It is very well settled, however, that "Under a given state of facts, whether negligence is culpable is a question of judgment. Ordinarily for the judgment of the jury, as is the question whether negligence exists at all" (*People* v. *Angelo, supra*, p. 457).

New Penal Law

The crime of Manslaughter in the Second Degree, insofar as here important, is now defined in § 125.15 as follows:

> "A person is guilty of manslaughter in the second degree when: (1) he recklessly causes the death of another person."

Section 15.05 is the definition section and subdivision 3 defines "Recklessly" as follows:

> "A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto."

It is clearly apparent from the words of the revisors themselves that the criminally negligent homicide previously punished under § 1053-a is now identified as a "recklessly" caused death punished as Manslaughter Second Degree (125.15). This conclusion is fortified by the following language:

> "Although the judicial construction thereof [culpable negligence] was not very precise, it would appear to be closer to the revised Penal Law's concept of recklessness than to its concept of 'criminal negligence.'"

Section 125.10 entitled "Criminally Negligent Homicide" reads as folows:

> "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."

Turning back to the definition section, 15.05, we note that "criminal negligence" is defined as follows in subd. 4:

> "A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree t hat the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

According to the commentaries, "This offense must be regarded as at least partially new as indicated in previous definition provisions * * *, 'criminal negligence' is in a sense a lower form or degree of *recklessness*. Though defining many offenses based upon the culpable mental state of recklessness, the revised Penal Law contains only two which are satisfied by 'criminal negligence' * * *."

"It is probable that the former Penal Law presented no crime truly equivalent to the instant one. This is so despite one general homicide offense of 'culpable negligence', designated second degree manslaughter * * * and a host of miscellaneous homicide offenses of the negligence genus, some designated manslaughter and others separately defined, dealing with specific conduct of one sort or another * * *."

In making the choice whether to proceed in an automobile accident case where death results under Manslaughter Second Degree (125.15), or a criminally negligent homicide (125.10), the Revisor's Notes under 15.05 are most helpful.

> "Conceptually more intricate are the terms 'recklessly' (subd. 3) and 'criminal negligence' (subd. 4), which are designed to crystalize an area of culpability long fraught with uncertainty. The common denominators of these two terms are that the under-

lying conduct must, in each instance, involve (1) 'a substantial and unjustifiable risk' that a result or circumstance described by a penal statute will occur or exists, as the case may be, and (2) 'a gross deviation' from the standard of conduct or care that a reasonable person would observe. The reckless offender is aware of that risk and 'consciously disregards' it (subd. 3). The criminally negligent offender, on the other hand, is not aware of the risk created (subd. 4) and, hence, cannot be guilty of consciously disregarding it. His liability stems from a culpable failure to perceive it. His culpability, though obviously less than that of the reckless offender, is appreciably greater than that required for ordinary civil negligence by virtue of the 'substantial and unjustifiable' character of the risk involved and the factor of 'gross deviation' from the ordinary standard of care.

It is important to observe that, despite an apparent mutual exclusiveness, as between recklessness and criminal negligence, a person may, in one situation at least, act with both forms of culpability. By express provision, one who with criminal negligence fails to perceive the indicated risk created by him also acts 'recklessly' if his unawareness or failure of perception results solely from 'voluntary intoxication' (subd. 3). This proposition is not as artificial as it might appear on the surface. It may be illustrated by considering the driver of a car who stops at a bar, drinks heavily, continues on his way and then runs over a pedestrian whom he fails to see in his intoxicated condition and whom he undoubtedly would have seen had he been sober. Here, his culpability goes well beyond his failure of perception

> at the time of the accident. By getting drunk in the course of his automobile trip, he consciously disregarded a substantial and unjustifiable risk of accident and, hence, in the overall setting he acted 'recklessly (subd. 3)."

It is perfectly clear why the Legislature has wisely carved out a completely new category to govern the large number of homicides resulting from automobile accidents not previously punishable as culpable negligence under the former law.

The increasing number of highway deaths related to alcohol has justly caught the attention of our State Legislature which, during recent times, has sought to eradicate the drunk driver from our highways. Thus, according to one newspaper, the National Safety Council reported to the U.S. Department of Transportation that for the year 1970 there were approximately 55,000 traffic deaths nationwide and over 50 percent thereof were alcohol related.*

An examination of the changes and amendments to Sections 1192-1194 of the Vehicle & Traffic Law further establishes the trend and intent of the Legislature to reduce the large number of homicides resulting from automobile accidents (see L. 1959, c. 775 amended L. 1960, c. 184, § 1; L. 1960, c. 749; L. 1961, c. 255; L. 1963, c. 869, §§ 1, 2;

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* Patrick M. Murphy, Jr., Legislative Counsel to New York State Sen. John D. Caemmerer. In New York State in 1969, there were 463,334 reportable vehicle accidents occurring in 68,582,000,000 estimated miles travelled (State of New York, 1970, Dept. of Motor Vehicles, *Accident Facts,* pp. 9-10). Motor vehicle accidents account for almost as many deaths in this country as all other categories of accidents combined (U. S. Dept. of Commerce, *Statistical Abstract of the United States,* 1971, p. 58). In 1968 traffic accidents caused 54,862 deaths, an estimated 4,400,000 personal injuries, as well as huge losses in property damage (*id.*, at pp. 58, 541). (See *People* v. *Samuel,* 29 N.Y. 2nd 252, at 259.)

L. 1966, c. 963, § 1; L. 1969, c. 146, eff. Jan. 1, 1970; L. 1970, c. 275; § 3; amended L. 1971, c. 495, § 1, eff. Jan. 1972; L. 1971, c. 200, eff. Sept. 1, 1971; L. 1970, c. 275, § 4; L. 1971, c. 445, §§ 1, 2, eff. Sept. 1, 1971; L. 1971, c. 928, eff. Jan. 1, 1972).

A comparison of the most recent amendments reveals the Legislature has been reducing the percent of alcohol required to convict.

Appellant has been convicted not of Manslaughter 2nd Degree for recklessly causing the deaths of Richard Lucey and Margaret Gribben, *as he might have been*, but the less serious offense in that he failed to "perceive the substantial and unjustifiable risk to himself and to others" when he drove wildly about this four-lane road for a distance of two miles while obviously under the influence of liquor.

The proof is clear and convincing that Kealey did not know what he was doing from the time he left Hickey's Shell Gas Station and entered the Bayville Road until the accident more than two miles away.

During this time, his operation of a motor vehicle was a serious danger, not only to himself but to others on the highway, as clearly shown by the testimony of Messrs. Simone, Hendrickson, Schultz and Peiffer, who established, in essence, that Kealey drove from one side of the road to another, crossing back and forth on this four-lane road, at a rate of speed that was clearly dangerous under the circumstances to himself and other users of the thoroughfare.

Defendant's erratic driving on the Bayville Road from Horse Hollow Road to the point of impact, a distance of 2 miles, was clearly established by a number of witnesses.

Thus, Mr. Simone was unshaken in his view that defendant drove over and across all four lanes of the Bayville

Road (274-79), almost striking a little red car (280-82, 319). Speedwise, Simone estimated he had been traveling 35 to 40 m.p.h. while Kealey was going faster, ever increasing his speed.

Hendrickson also observed the Ford going from northbound to southbound lanes and back at speeds of 45 m.p.h. and greater on a road where Hendrickson believed the speed limit was either 40 or 45 m.p.h. (343-81).

Reginald Schultz testified he was driving at 40 m.p.h. and Kealey passed him and another car in a wide sweep, swerving abruptly and going into one of the opposite traffic lanes, and almost hitting a car it was about to pass (390-413).

Mr. Peiffer, while driving between 35-45 m.p.h., was also passed by defendant's vehicle and observed it go way over the double yellow line, and swerve back all the way to the slow northbound lane (525-46).

Further evidence of defendant's excessive speed may be seen in the damage to the rear of the victims' Chrysler automobile (as depicted in People's Exhibits 1 and 7 in evidence) together with the severe damage to the front end of the defendant's vehicle (People's Exhibit 2 in evidence).

Proof of Kealey's intoxication and its effect upon his ability to control his car was clearly established by the testimony of the foregoing witnesses.

So, too, the testimony of the gas station owner, Mr. Hickey, relative to the defendant's loud and belligerent conduct at the station, the erratic manner in which he drove his vehicle from the station, the defendant's bloodshot eyes, flushed face, and the smell of alcohol emanating from him was strong evidence of appellant's intoxication immediately prior to the accident (641-61).

The newspaper publisher, Hawthorne, smelled the heavy odor of alcohol on the defendant's breath, and observed him stagger away from his automobile, being assisted by two policemen (553-60). The police witnesses at the scene, Keteltas, Duchnowski and Coruzzi, corroborated the observations of Mr. Hawthorne (423-36, 437-50).

Sergeant Ferrand also testified the posted speed limit on the Bayville Road at the scene of the accident was 40 m.p.h., and there was a sign nearby to this effect (465-87).[1]

The risk to not only Mr. Lucy and Mrs. Gribben, as well as other mtorists on the Bayville Road, was greatly magnified and amplified by the very nature and character of the road itself.

The testimonies of Messrs. Simone (276, 306-07, 328), Hendrickson (342, 348, 376), Schultz (391), Peiffer (538-39), and Sergeant Ferrand (463-66, 468-69) clearly establish this 40 foot wide, 4 lane road, without any shoulders, was dangerous, because the lanes were narrow and also because the road was bordered by trees immediately contiguous to both northbound and southbound curb lanes on the highway.

The dangerous character and risk entailed in traversing this road is clearly depicted in People's Exhibit 4 in evidence.

Appellant, according to the record, resided within a block or two of the scene of the accident, and himself testi-

1. Although not introduced at the trial or request for judicial notice thereof to be taken, Ordinance No. 1 of the Village of Lattingtown in effect, as amended through May 19, 1964, provides a speed limit of 40 mph on the Bayville Road encompassed in the instant record, and this court is requested to take judicial notice thereof pursuant to CPLR 4511 and *People* v. *Zambito* [1959] 21 Misc. 2d 815; Richardson on Evidence, 9th Ed. Sec. 21.

fied to traveling this road at least on the day of the accident. Can it not be inferred that appellant was most familiar with this road and, therefore, "aware of * * * a substantial and unjustifiable risk * * * " which he consciously disregarded while driving on the Bayville road (§ 15.05, subd. 3, Penal Law).

It is also readily apparent Kealey's drinking on this day caught up with him and prevented him from being "aware of" the risk or from "perceiving or realizing a very great danger to himself and others" caused by his driving, or he would have parked his car by the side of the road and gone to sleep.

The conclusion is inescapable that the jury found Kealey's conduct was such a "gross deviation from the standard of care that a reasonable person would observe in the situation" that a guilty verdict was the only one possible on the evidence.

It is respectfully submitted Kealey was legally, morally, and criminally liable for the deaths of Richard Lucey and Margaret Gribben.

In *People* v. *Haney* [1972] 30 N.Y. 2d 328, the Court reviewed § 125.10 and 125.15 dealing with criminally negligent homicide and manslaughter in the second degree respectively. Judge Jasen speaking for a unanimous court concluded as follows (pp. 332-335):

> "The revised Penal Law makes unintended homicide manslaughter in the second degree, when it is committed 'recklessly' (Penal Law, § 125.15) [4] and when committed 'negligently', though not recklessly, it is criminally negligent homicide. (Penal Law, § 125.10.)

4. When homicide committed recklessly becomes murder, see Penal Law, § 125.25 (subd. 2); *People* v. *Poplis* (30 N Y 2d 85).

The distinction between these two crimes is provided in section 15.05 (subds. 3 [5], 4) of the Penal Law, which specifically describes the mental state requisite for each. The reckless offender is aware of the proscribed risk and 'consciously disregards' it, while the criminally negligent offender is not aware of the risk created and, hence, cannot be guilty of consciously disregarding it. (Commission Staff Notes, Gilbert Criminal Code and Penal Law [1971], *supra*, at p. 2-248; see, also, discussion in Gegan, Criminal Homicide in the Revised New York Penal Law, 12 N.Y.L.F. 565, 578-579; Schwartz, Penal Law, Twelfth Annual Report of N. Y. Judicial Conference [1967], p. 109.) Since the criminally negligent offender's liability arises only from a culpable failure to perceive the risk, his culpability is obviously less than that of the reckless offender who consciously disregards the risk. (See Model Penal Code, Tent. Draft No. 9 [May 8, 1959], § 201.4, at p. 53.) [6] It is, however, 'appreciably greater than that required for ordinary civil negligence by virtue of the "substantial and unjustifiable" character of the risk involved and the factor of "gross deviation" from the ordinary standard of care.' (Commission Staff Notes, Gilbert Criminal Code and Penal Law [1971], *supra*, p. 2-248; cf.

5. "§ 15.05 Culpability; definitions of culpable mental states. * * * 3. 'Recklessly.' A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

6. Criminally negligent homicide is a Class E felony, whereas manslaughter in the second degree is a Class C felony.

Prosser, Law of Torts [4th ed.], § 31; Restatement, Torts, § 282.) [7]

Enactment of section 125.10 represents a marked change from prior law as the former Penal Law contained no crime truly equivalent to it. (Practice Commentary by Denzer and McQuillan, McKinney's Cons. Laws of N. Y., Book 39, Penal Law, § 125.10, at pp. 224-225.) The present law lacks the moral implication of murder (Penal Law, § 125.25) or manslaughter in the first or second degree (Penal Law, §§ 125.15, 125.20), each of which involves awareness of the harm which will (or in some degree probably will) result from the offender's conduct. Criminally negligent homicide, in essence, involves the failure to perceive the risk in a situation where the offender has a legal duty of awareness. It, thus, serves to provide an offense applicable to conduct which is obviously socially undesirable.[8] '[It pro-

7. Criminal liability for death caused by ordinary negligence is sometimes imposed by statute. It should be noted that most of these statutes are confined to deaths arising out of automobile accidents. (See Riesenfeld, Negligent Homicide, A Study in Statutory Interpretation, 25 Cal. L. Rev. 1; Ann. Automobiles—Negligent Homicide, 20 ALR 3d 473; 3 Wharton, Criminal Law and Procedure [R. Anderson ed.], § 976.) For an example of ordinary negligence, sufficient to establish liability for a nonvehicular homicide, see *People* v. *Sandgren* (302 N.Y. 331), interpreting a paragraph of section 1052 of the former Penal Law.

8. The crime of criminally negligent homicide is one of general application, encompassing an infinite variety of conduct, which consists both of acts of commission and omission. As the Practice Commentary indicates, its principal utility however, will "doubtless be the same as that of the former Penal Law's *vehicular homicide* crime (§ 1053-a), the application of which was limited exclusively to vehicle cases." It is to be observed, though, that while under both section 1053-a and section 125.10 ordinary civil negligence is not sufficient to predicate criminal responsibility, the degree of proof required to convict under these sections is different. (Commission Staff Notes, Gilbert Criminal Code and Penal Law [1971], *supra*, at p. 2-264.)

scribes] conduct which is inadvertent as to risk only because the actor is insensitive to the interests and claims of other persons in society.' (Model Penal Code, Tent. Draft No. 9, *supra*, at p. 53.) The Legislature, in recognizing such conduct as criminal, endeavored to stimulate people towards awareness of the potential consequences of their conduct and influence them to avoid creating undesirable risks. (See Wechsler and Michael, A Rationale of the Law of Homicide, 37 Col. L. Rev. 701, 749-751; 64 Col. L. Rev. 1469, 1538; Model Penal Code, Tent. Draft No. 4, *supra*, at pp. 126-127.) [9]

What amounts to a violation of this section depends, of course, entirely on the circumstances of the particular conduct. Whether in those circumstances the act or acts causing death involved a substantial and unjustifiable risk, and whether the failure to perceive it was such as to constitute a gross deviation from the standard of care which a reasonable man would have observed under the same circumstances, are questions that generally must be left directly to the trier of the facts. In other words, '[t]he tribunal must evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned.' (Model Penal Code, Tent. Draft No. 4, *supra*, at p. 126; see, also, Moreland, A Re-Examination of the Law of Homicide in 1971: The Model Penal Code, 59 Ky. L. J. 788, 828.)

While it is difficult to clarify further these questions (cf. *People* v. *Eckert*, 2 N Y 2d 126, 130;

9. Compare Hall, Negligent Behavior Should Be Excluded from Penal Liability, 63 Col. L. Rev. 632; 16 Buff. L. Rev. 749.

> *People* v. *Angelo*, 246 N. Y. 451, 457), it would seem sufficiently clear that for proper determination of these questions, two main considerations should be emphasized. Firstly, criminal liability cannot be predicated upon every careless act merely because its carelessness results in another's death; and, secondly, the elements of the crime 'preclude the proper condemnation of inadvertent risk creation unless "the significance of the circumstances of fact would be apparent to one who shares the community's general sense of right and wrong".' (Model Penal Code, Tent. Draft No. 9, *supra*, at p. 53, citing Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 417.)"

Testing § 125.10 and § 15.05, subd. 4, as interpreted by the New York State Court of Appeals in *Haney* leaves no room for doubt about the meaning of the language in the statute. The test or standard has been carefully defined and restricted by the court in *Haney* so that every motorist in New York knows he cannot or should not operate a car under the circumstances proved against petitioner. Counsel's argument, " 'gross deviations' or the 'applicable standard of care' or 'what a reasonable man would have observed' " (7) are too uncertain is specious because of the definition in § 15.05, subd. 4, and the restrictive interpretation placed on § 125.10 by the New York Court of Appeals in *Haney*. Equally specious is the hypothetical case of the "thoughtful or engrossed employee leaving his work" (9) who kills someone driving home. Absent any evidence of criminality, he would not be guilty in New York, or any other jurisdiction, of a crime because he was "thoughtful or engrossed." The handicapped driver in New York, though licensed to drive, is not licensed to kill with im-

munity (*People* v. *Eckert* [1956] 2 N.Y. 2d 126 [epileptics]; *People* v. *Decina* [1956] 2 N.Y. 2d 133 [epileptics]). It is unreal to argue that a deaf driver or operator whose hearing has been seriously impaired would be free to drive and kill in New York without criminal responsibility (see, e.g. *People* v. *Eckert, supra; People* v. *Decina, supra*). Seriously handicapped drivers are under a special duty to exercise caution less they lose control of their auto and seriously injure or kill another (*supra; Matter of Enos* v. *Macduff* [4th Dept. 1953] 282 App. Div. 116). The rule is the same elsewhere in the United States (Anno: Automobiles—Illness or Drowsiness, 28 ALR 2d 12).

Petitioner is in error when he argues "The constitutionality of the statutes involved, read together, have not been ruled upon by the courts of the State of New York" (7).

By order dated December 27, 1973, a motion by petitioner to amend the remittitur was granted as follows:

> "Upon appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz: Defendant-appellant argued that he had been denied due process of law because the statute under which he was convicted (Penal Law, § 125.10) is unconstitutionally vague. The Court of Appeals held that appellant's constitutional rights were not violated."

Moreover, in 1972 Judge Jasen reporting for a unanimous court in *People* v. *Haney* (30 N.Y. 2d 328) carefully laid out the requirements for a prima facie case under the statute. Indirectly, if not directly, Judge Jasen concluded

the test or standard in the statute was sufficient. It is respectfully submitted doubt or uncertainty does not exist in New York in connection with the requirements to make out a prima facie case.

CONCLUSION

Certiorari should not be granted.

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Nassau County
Attorney for Respondent

HENRY P. DEVINE
Assistant District Attorney
of Counsel.
(Indict. No. 26,107)